Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MISC. NO. 79-285

CHRISTOPHER GITCHO,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on July 12, 1979.

OPINION BELOW

The opinion of the Court of Appeals is, as yet, unpublished, but is appended hereto as Appendix A-1.

JURISDICTION

The judgment of the Court of Appeals was filed on July 12, 1979 reversing the decision of United States District Judge John

Regan and upholding the validity of a search warrant despite an erroneous description of the place to be searched. A Motion for Rehearing or Rehearing En Banc was denied on July 27, 1979 (App. A.-2). On July 21, 1979 this Court entered an order extending the time to file a Petition for a Writ of Certiorari to and including September 10, 1979 (App. A-3). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

A. Should evidence seized pursuant to a search warrant be suppressed when the warrant contains an erroneous street number and an erroneous street name with no further description of the premises to be searched and where the only basis for upholding the warrant is that the executing agents knew what premises were to be searched having surveilled the premises?

B. Should evidence seized pursuant to a search warrant be suppressed when a law enforcement officer makes an in-person oral affidavit to the Federal Magistrate in lieu of the written affidavit required by Rule 41 F.R.Cr.P.?

STATEMENT

On October 13, 1978, at approximately 4:00 a.m., Petitioner and Ernest Parker were observed by agents of the U. S. Drug Enforcement Administration loading a shipment of chemicals into Petitioner's automobile (AT. 13). The chemicals, anthranibic acid and orthotoluidine, are immediate precusors for Methaqualone, a Schedule II controlled substance (T. 9).

Petitioner and Parker were then observed driving to and entering an apartment in the Parc Chalet Apartment Complex in North St. Louis County with the chemicals. The correct address of the apartment is 4146 Parc Chalet Drive, Apartment

No. 7. The numbers "4146" on the apartment were clearly visible to the agents who were aided further in their surveillance through the use of binoculars (T. 26, 27, 40).

At approximately 6:00 p.m. that evening, agents allegedly observed Petitioner and Parker begin "manufacturing" the Methaqualone (T. 11-12), and the agents determined that it would be advisable to obtain a search warrant as soon as possible. The agents, together with an Assistant United States Attorney appeared before the United States Magistrate later that evening. Despite the fact that the agent making the application had previous experience in typing his own applications for search warrants, the agents made only an oral application contending that they did not have adequate secretarial services available at that time (T. 32).

The oral application for a search warrant, which was recorded and later transcribed, gave the address of the premises to be searched as 4144 Geraldine, Apartment No. 7, Parc Chalet Apartments, St. Louis County, Missouri thereby misstating both the street name and the number. The agent did not give any further description of the premises to be searched and a handwritten warrant with the incorrect address was issued at 11:55 p.m., with the incorrect address appearing thereon (T. 13).

At a hearing on Petitioner's Motion to Suppress Evidence, it was established that at least seven agents (T. 10) had the Petitioner's apartment under surveillance over a period of two and one-half to three hours (T. 29) prior to applying for a search warrant. While one agent was applying for the warrant, surveillance on the apartment continued (T. 33).

Agent Patterson testified that he received the incorrect "4144 Geraldine" address in a radio transmission from Agent Shurn. Shurn stated that he had no difficulty seeing or reading the address, but may have given the wrong address to Patterson over the radio (T. 40).

However, during the suppression hearing, Agent Patterson clearly and concisely (in 35 words or less) *physically* described the apartment and its location during the hearing (T. 11, 28) but acknowledged that he included no such description in the warrant or the application for the warrant (T. 28). These items contained only the incorrect street number and incorrect street name as a "description" of the place to be searched (T. 28). Agent Patterson, who had been a police officer, and had previously typed applications for search warrants, testified that he usually included within those applications a physical description of the premises to be searched (T. 32), but that he had not done so in the instant case.

In sustaining Petitioner's suppression motion, United States District Court Judge John K. Regan stated that there was no question but that the agents executing the warrant personally knew which premises were to be searched. He went on to state, however, that the "Friday the 13th 'comedy of errors' had come into conflict with the requirement of the Fourth Amendment that the warrant particularly describe the place to be searched". (Order, December 19, 1978, p.6).

In reversing the lower court's ruling, the Court of Appeals noted that the facts, as found by the District Court, "make this case admittedly close". (*Opinion*, July 12, 1979, p.4).

The Court cited several cases which hold that where the address of the premises to be searched is the only description in the warrant and that address is incorrect, evidence seized in the subsequent search must be suppressed. (*Opinion*, at 4-5). The Court, however, declined to follow these prior decisions and based its reversal on the findings that: (1) the address stated in the warrant does not exist (a finding not supported by the record); (2) the agents executing the warrant personally knew which premises were intended to be searched; and (3) the premises intended to be searched were, in fact, those actually searched. (*Opinion* at 5).

REASONS FOR GRANTING THE WRIT

I. Further Direction Is Needed to Resolve an Apparent Conflict in the Federal Circuits and to Determine Whether, Under Any Circumstances, an Affidavit and a Search Warrant Containing Only an Inaccurate Address and No Other Description of the Premises to Be Searched Will Be Deemed Sufficient to Satisfy the Fourth Amendment Requirement That the Place to Be Searched Be Described With Particularity.

The plain language of the Fourth Amendment is that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched* . . ." A warrant describing the place to be searched only as "4144 Geraldine" simply does not describe the actual place searched, 4146 Parc Chalet Drive, with any degree of particularity. In spite of the street number and street name discrepancies, however, the United States Court of Appeals for the Eighth Circuit found that this "close" question should be decided in favor of upholding the warrant. Petitioner notes that the Court of Appeals decision substantially extends the latitude afforded police in complying with "Particularity" Requirements of the Fourth Amendment and conflicts with holdings among other Federal and State Courts. Moreover, the decision alters the meaning to be afforded the plain language of the Fourth Amendment.

Both Federal and State courts have consistently invalidated warrants where the only description of the premises to be searched is an incorrect street number or street name. In *State v. Buchanan*, 432 S.W.2d 342, 344 (Mo. 1968), the Missouri Supreme Court suppressed evidence seized from "314 N. Hocker" where the affidavit and warrant stated "310 N. Hocker"; the court noted that, under the Fourth Amendment, "the de-

scription of the place to be searched is a vital element of a search warrant".

In *United States v. Kenney*, 164 F.Supp. 891, 893 (D.D.C. 1958), the Court suppressed evidence seized from "2124—8th Street, N.W." where the warrant and affidavit recited "2144—8th Street, N.W.". The Court reasoned that probable cause had been established only for the "2144" location specified in warrant and not for the "2124" location, which was actually searched. Similarly, in *United States v. Constantino*, 201 F. Supp. 161 (W.D.Pa. 1962), the Court granted a motion to suppress evidence where executing officers changed the street number in a warrant twice, upon discovery that it was the incorrect address. In *Bucari v. Fili*, 31 F.Supp. 433 (M.D. Pa. 1940), evidence was suppressed where the warrant conceivably authorized search of two premises because it failed to specify whether the address was north or south "Main Street".

The Court in *United States v. Sands*, 14 F.2d 670 (9th Cir. 1926) held that a warrant lacked the requisite particularly where it recited both an incorrect street number and occupants. In *United States v. Alexander*, 278 F. 308, 309 (S.D. Fla. 1922) the court held a warrant "insufficient and void" which provided no street number and only described the premises as located at "the corner of Davis and Ashley" streets.

In a case strikingly similar to the one at issue here, the Colorado Supreme Court in *People v. Royse*, 173 Colo. 254, 477 P.2d 380, 381 (1970) declared the search of "3043 Mallard Drive, Apt. 305" to be "clearly unlawful" where the warrant specified "3043 East Fountain, Apt. #305". Similar to the case at bar, this premise was one of nine buildings in an apartment complex; the wrong address was furnished by the officer who had surveyed the apartment. The court stated:

> "[I]f a police officer executed a search warrant at a place not described in the warrant, the search and seizure is (sic) without any semblance of validity . . . to describe the place to be searched with particularity, as is required, certainly means that if the place has an established street address, and this is the only method of description utilized, the correct address, and only the correct address will suffice. In our view, this is a self evident constitutional requirement . . .' Id. at 382.

These cases clearly establish that the ruling of the Court of Appeals in the case at bar constitutes a substantial weakening of the unequivocal language of the Fourth Amendment. The only description of the premises in the affidavit (P. 14) and in the warrant was the street address of "4144 Geraldine, Apt. No. 7, Park Chalet Apartments, St. Louis, Missouri". The address of the premises searched was 4146 Parc Chalet Drive. Although, at the hearing on the motion to suppress, Agent Patterson gave a clear and concise description of the Petitioner's apartment and its location (T. 11), and acknowledged that it was customary for him to include such a description in search warrant applications, there is no physical description of the apartment or of its location in either the oral affidavit or the warrant. Without such further description of the premises to be searched, previous case authority should have required that the warrant be found invalid as was so found by the District Court.

Petitioner concedes that the agents knew which apartment they wanted to search and that they ultimately searched that apartment. The issue, however, is not whether the agents searched and seized evidence from the "right" apartment, but whether the courts should hold the agents to the representations made to the magistrate judge of the place to be searched and the evidence to be seized. By allowing the government to search a place not described in the affidavit or search warrant, the value of obtaining such a warrant is diminished to such an extent as to make a search warrant valueless.

The logical extension of the Court of Appeals' ruling is to totally abrogate the "description" requirement in all cases where the agents making the application also execute the warrant. In all such cases the agents obviously know what premises they want to search and under the Court's Opinion in this case there would simply be no need for the affidavit or warrant to contain a description. The Court's decision, based on the fact that the agents searched the "right" apartment, is subject to the extreme abuse which the Fourth Amendment is meant to prevent. A decision which allows total abrogation of the Fourth Amendment "particularity" requirement by means of a retrospective determination that agents searched the "right" place is certainly an extreme departure from past precedent which should be scrutinized by this Court.

In view of the apparent confusion and conflict of decisions on this issue, Petitioner submits that this Court should hear the case, determine if a search warrant which, on its face, does not describe the premises ultimately searched can withstand Constitutional scrutiny pursuant to the Fourth Amendment and determine what, if any, further description of the premises to be searched must be included in such a warrant.

II. Guidance Is Needed From This Court to Determine Whether the Recent Revision to Rule 41 F.R.Cr.P. Pertaining to the Issuance of Warrants on Oral Testimony Was Intended to Abrogate the Need for Written Affidavits Even in Situations Where the Agent Personally Appears Before the Magistrate in Making His Application.

Although the District Court did not base its order suppressing the evidence on the improper use of an oral affidavit and the Court of Appeals found no prejudice resulting from its use, Petitioner submits that the oral affidavit of Special Agent Lloyd W. Patterson was not authorized by Rule 41(c)(2) Fed.R.Cr.P.,

did not come within the purpose of that Rule, and severely prejudiced Petitioner's case.

Rule 41 states in pertinent part as follows:

> "(c) Issuance and contents.
>
> (1) Warrant upon affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant.
>
> (2) Warrant upon oral testimony.
>
> (A) General Rule.—If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means."

By the language of 41(c)(1) it is apparent that a written affidavit is required unless specifically within the provision of subsection (c)(2)(A). The provisions of 41(c)(2)(A) permit a Federal Magistrate to dispense with a written affidavit if the warrant is based upon sworn testimony communicated by telephone or other appropriate means. It is apparent from the language of the statute, as supplemented by the Notes of Advisory Committee on Rules, that it was contemplated that oral testimony would be an acceptable substitute only where the person making the statement is not in the physical presence of the Federal Magistrate.

> "subdivision (c)(2) provides that a warrant may be issued on the basis of an oral statement of a person not in the physical presence of the federal magistrate. Telephone, radio, or other electronic methods of communication are contemplated."

Notes of Advisory Committee on Rules

The Senate Report also mentions the use of oral statements only in the context of telephone communications. U.S. Code Cong. and Ad. News, 1484 (1977).

In the instant case, Special Agent Lloyd W. Patterson of the Federal Drug Enforcement Administration appeared in person on October 13, 1978 at approximately 11:10 p.m. before the United States Magistrate and gave an oral sworn statement concerning Petitioner's activities. The Assistant United States Attorney contended that he was unable to obtain secretarial services and hence there was a basis for the oral statement. However, Agent Patterson testified that he had on previous occasions typed applications for search warrants himself (T. 31). Petitioner submits that this procedure is neither authorized nor contemplated to come within the exception to the submission of a written affidavit as specified under Rule 41. The affiant, Agent Patterson, was present before the Court and could well have given a written affidavit at that time or at some earlier point in time given the length of the investigation and contemplated government search. The preference for a written affidavit is clear and is grounded in the premise that the court can better evaluate the facts which are the elements for a finding of probable cause.

The problems which arise from the use of an oral affidavit are exemplified by the deficiencies in the narrative of Agent Patterson in the instant case:

1. Nowhere does the affidavit give a physical description of the premises to be searched;

2. It is not clear which of several addresses mentioned in the affidavit are sought to be searched;

3. The circumstances alleged are quite confusing and arguably do not clearly establish probable cause (although this issue was determined adversely to appellant by the Trial Court).

The purpose of the recent amendment to the Rule is to allow the issuance of a warrant where it is not possible for a law enforcement officer to appear before the magistrate to give a written affidavit. The instant case is clearly not with the Rule. See, Senate Report, *supra*,

As a result, the search warrant was issued by an unauthorized procedural process and was thereby invalid. Hence, the search conducted pursuant to the warrant should be deemed unlawful.

Because Subsection C(2)(A) of Rule 41, F.R.Cr.P. is new and its application has not as yet been considered by this Court, Petitioner submits that this Court should hear arguments concerning the rule and determine whether the rule must be applied strictly, based on legislative intent, or whether the Advisory Committee Notes should simply be considered directory.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and Opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 79-1055

United States of America,
Appellant,

v.

Christopher Gitcho,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: June 11, 1979

Filed: July 12, 1979

Before HEANEY and STEPHENSON, Circuit Judges, and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals.

HEANEY, Circuit Judge.

The United States has brought this appeal, pursuant to 18 U.S.C. § 3731, challenging an order of the District Court which orders the suppression of evidence in the criminal trial of Christopher Gitcho.[1] We reverse.

---

* HOWARD T. MARKEY, Chief Judge, United States Court of Customs and Patent Appeals, Washington, D. C., siting by designation

[1] In his brief, filed on April 5, 1979, Gitcho contends that the failure of the United States Attorney to file a certification, required by 18 U.S.C. §3731, requires the dismissal of this appeal. Since this certification has since been filed, we will proceed to entertain the government's appeal. *See United States v. Wolk*, 466 F.2d 1143, 1146 n.2 (8th Cir. 1972); *United States v. Kleve*, 465 F.2d 187, 190 (8th Cir. 1972).

On October 13, 1978, at approximately 11:55 P.M., a warrant was issued by a United States Magistrate for premises described in the warrant as "4144 Geraldine, Parc Chalet Apartments, St. Louis County, Missouri." There is no such numbered building in existence. At the time of the issuance of the warrant, federal agents had the premises of 4146 Parc Chalet, Apartment 7, St. Louis County, Missouri, under surveillance. It was the latter premises at which an unlawful drug manufacturing process was in progress and for which probable cause for the search existed. The circumstances surrounding the error in the address of the premises to be searched which was stated in the warrant were found by the District Court to be as follows:

> The building (* * * which had been under surveillance * * * and in which the allegedly unlawful activity had been in progress) is the second building east of Geraldine and north of the parking lot in the Parc Chalet Apartment complex. The apartment complex is in the 4100 block of Geraldine. There is no street sign which says Park Chalet Drive. That is an unmarked street which is actually a parking lot. The agents had no way of knowing that the parking lot was Parc Chalet Drive. An attempt had been made, unsuccessfully, to contact the building manager for the exact address. Under the normal numbering system, the numbers drop by four where, as in this case, there are double building, that is, building number 4148 would normally have attached to it a building numbered 4144. However, the numbering on the building in question is inconsistent with the other numbering, in that it dropped by only two. In addition, some of the apartments in the complex face directly on Geraldine and some are directly in back of Geraldine. However, they are numbered as though they were on the same street.

The District Court found that "[t]here is no question but that the agents executing the warrant personally knew which premises were to be searched." The court held, however, that the "Friday the 13th 'comedy of errors' has come into conflict with the requirement of the Fourth Amendment that the warrant particularly describe the place to be searched." Accordingly, the court ordered that any evidence obtained as the fruit of the search be suppressed.

The test for determining the sufficiency of the description of the place to be searched is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched. *See United States v. Prout*, 526 F.2d 380, 387-388 (5th Cir.), *cert. denied*, 429 U.S. 840 (1976); *United States v. Darensbourg*, 520 F.2d 985, 987 (5th Cir. 1975); *United States v. Bedford*, 519 F.2d 650, 655 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

Where one part of the description of the premises to be searched is inaccurate, but the description has other parts which identify the place to be searched with particularity, searches pursuant to such warrants have been routinely upheld. *See, e.g., United States v. Shropshire,*, 498 F.2d 137 (6th Cir. 1974), *appeal dismissed*, 420 U.S. 901 (1975); *United States v. Pisano*, 191 F.Supp. 861 (S.D. N.Y. 1961). Other factors which have been cited in upholding searches made pursuant to search warrants which contained some inaccuracies in the description of the premises to be searched are that the address given in the warrant, even if incorrect, still describes the same piece of property, *see United States v. Smith*, 462 F.2d 456, 460-461 (8th Cir. 1972); *Hanger v. United States*, 398 F.2d 91, 98-99 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969), that the premises intended to be searched are adjacent to those described and all are under the control of the defendant, *see*

United States v. Malancon, 462 F.2d 82 (5th Cir.), *cert. denied*, 409 U.S. 1038 (1972), that the incorrect address describes a place not in existence, or that other parts of the description which are correct limit the place to be searched to one place, *see United States v. Darensbourg, supra* at 988; *United States v. Goodman*, 312 F.Supp. 556 (N.D. Ind. 1970), and that the premises which were intended to be searched had previously beeen surveilled or were being surveilled while the warrant was obtained. *See United States v. Prout, supra* at 388; *United States v. Hassell*, 427 F.2d 348 (6th Cir. 1970); *United States v. Curwood*, 338 F.Supp. 1104, 1112 (D. Mass. 1972); *United States v. Ramos*, 282 F.Supp. 354, 355 (S.D. N.Y. 1968).

The facts, as found by the District Court, make this case admittedly close. The only description of the premises to be searched, which is found in the warrant, is the street address, "4144 Geraldine," which the government concedes is technically incorrect. Several courts have held that where the address of the premises to be searched is the only description in the warrant and that address is incorrect, evidence seized in the subsequent search must be suppressed. *See United States v. Constantino*, 201 F.Supp. 160 (W.D. Pa. 1962); *United States v. Kenney*, 164 F.Supp. 891 (D. D.C. 1958); *Bucari v. Fili*, 31 F.Supp. 433 (M.D. Pa. 1940). There were additional circumstances in this case, however, which convince us that the search should be upheld. The address stated in the warrant, although technically incorrect, was reasonable for the location intended. *See United States v. Sklaroff*, 323 F.Supp. 296, 320-321 (S.D. Fla. 1971). The address stated in the warrant does not exist, making the mistaken search of the wrong premises unlikely. Search of the wrong premises was also unlikely since the agents executing the warrant personally knew which premises were intended to be searched, and those premises were under constant surveillance while the warrant was obtained. The premises which were intended to be searched were, in fact,

those actually searched. *See United States v. Prout, supra* at 388; *United States v. Darensbourg, supra* at 988. We, therefore, hold that the District Court erred in suppressing the evidence seized pursuant to the search warrant on this ground.

Gitcho argues that the evidence in question should be suppressed on the alternate ground that the oral affidavit given by the agent requesting the search warrant was not authorized by Fed.R.Crim.P. 41(c)(2). It is true that Rule 41(c)(2) appears to authorize the use of an oral affidavit only when the person requesting the warrant is not in the physical presence of the magistrate, *see* Advisory Committee's Notes for the 1972 Amendments to Fed.R.Crim.P. 41(c)(2), and that the agent requesting the search warrant in this case did appear before the issuing magistrate. The District Court found, however, that an oral affidavit procedure was used because of the unavailability of secretarial services at the hour when the warrant was obtained. The oral affidavit was recorded at the time of its making, and a transcript of the affidavit was furnished to the District Court, making review of the existence of probable cause for its issuance possible. Under these circumstances, we find no prejudice to Gitcho from the agents' failure to follow the rule, or any evidence of intentional and deliberate disregard of the provisions of the rule, which would justify the suppression of the evidence seized. *See United States v. Burgard*, 551 F.2d 190, 193 (8th Cir. 1977); *United States v. Burke*, 517 F.2d 377, 386-387 (2d Cir. 1975).

The order of the District Court is reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 79-1055. September Term, 1978

United States of America, Appellant,

vs.

Christopher Gitcho, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

July 27, 1979

APPENDIX C

Supreme Court of the United States

No. A-61

Christopher Gitcho, Petitioner,

v.

United States

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 10, 1979.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme Court of the United States

Dated this 21st day of July, 1979.